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INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statute involved	2
Statement	3
A. The Board's findings of fact, conclusions and order	3
B. The decision of the court below	7
Argument	7
Conclusion	13

CITATIONS

CASES:

Bethlehem Steel Co. v. *National Labor Relations Board*, 120 F. 2d 641 11

Home Beneficial Life Insurance Company, Inc. v. *National Labor Relations Board*, 172 F. 2d 62 12

National Labor Relations Board v. *Baldwin Locomotive Works*, 128 F. 2d 39 11

National Labor Relations Board v. *Clark Bros. Co.*, 163 F. 2d 373 10

National Labor Relations Board v. *Collins & Aikman Corp.*, 146 F. 2d 454 10-11

National Labor Relations Board v. *Illinois Tool Works*, 153 F. 2d 811 9

National Labor Relations Board v. *Injection Molding Co.*, 211 F. 2d 59 10

National Labor Relations Board v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333 13

National Labor Relations Board v. *Pittsburgh Steamship Co.*, 340 U.S. 498 8

National Labor Relations Board v. *Syracuse Color Press, Inc.*, 209 F. 2d 596, certiorari denied, 347 U.S. 966 10

National Labor Relations Board v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 ..... 10, 12

Page

National Labor Relations Board v. *Vail Mfg. Co.*, 158 F. 2d 664, certiorari denied, 331 U.S. 835 9-10
Pedersen v. *National Labor Relations Board*, 234 F. 2d 417 .. 11
Radio Officers' Union v. *National Labor Relations Board*, 347 U.S. 17 10
Southport Petroleum Co. v. *National Labor Relations Board*, 315 U.S. 100 12

STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*):

Section 7 ..... 2, 10
Section 8(a)(1) 2, 3, 5, 7, 8, 9, 10
Section 8(a)(4) 6, 7, 8
Section 10(e) 11

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 406

BETTER MONKEY GRIP COMPANY, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 51-53) is reported at 243 F. 2d 836. The findings of fact, conclusions of law, and order of the Board (R. 38-73, 87-94)[1] are reported at 115 NLRB 1170.

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[1] References designated "R." refer to the Transcript of Record printed as Volume I pursuant to the rules of the court below; references designated "J.A." refer to the joint appendix to the briefs of the parties in the court below.

JURISDICTION

The decree of the court below was entered on June 18, 1957. A petition for rehearing was denied on May 29, 1957 (Pet. App. 54). The petition for a writ of certiorari was filed on August 27, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the Board's finding that petitioner discharged a supervisory employee because of his testimony in a prior Board proceeding and thereby violated Section 8(a)(1).

2. Whether the court below erred in denying petitioner's motion to remand the case to the Board for the purpose of adducing additional evidence.

3. Whether the court below properly refused to modify the Board's order to make reinstatement contingent upon a showing of the employee's present physical fitness.

4. Whether the decree of the court below enjoining petitioner from inducing or attempting to induce any witness to change his testimony in any proceeding before the Board is appropriate and valid.

STATUTE INVOLVED

The pertinent provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.*), in addition to those set forth in the Petition (pp. 41-43), is as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organ-

izations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

STATEMENT

A. *The Board's findings of fact, conclusions and order.* The Board found that petitioner violated Section 8(a)(1) of the Act by discharging Robert Whaley, a supervisor, because he gave testimony adverse to its interests in a prior Board proceeding. The subsidiary facts upon which this finding rests may be summarized as follows:

On July 17 and 19, 1954, the Board held a hearing on a prior unfair labor practice complaint against petitioner which alleged, *inter alia,* that petitioner had discriminatorily discharged six employees because of their union activities (R. 39-40; 27-32, J.A. 31-33).[2] Whaley testified under subpena that he had heard petitioner's plant manager make statements to the effect: (1) that he would "fire everyone that signed a union card if it took him ten years to do it, and he had a good memory"; and (2) that he "knew there was six of them leaders that started this union and he knew three of them and if he knew the other three, why,

[2] Case No. 16-CA-742, entitled "Better Monkey Grip Company and Upholsterers' Union of North America."

he would let them go now" (R. 44-45, n. 5, 43, n. 3, 46, n. 6; J.A. 10-13).

Following the issuance of the Trial Examiner's intermediate report in this prior case (August 27, 1954) finding it guilty of unfair labor practices, petitioner on three occasions sought to persuade Whaley to change his testimony (R. 45-46; 13-15). On September 7, petitioner's president asked Whaley if he would alter his testimony to the effect that the plant manager "said what he did in a joking manner or that he didn't mean what he said" (R. 45; J.A. 13-14). Whaley replied that he could not do so because that "would be lying" (R. 45; J.A. 14). The next day petitioner's attorney joined its president in requesting Whaley to repudiate his testimony or sign a statement that the plant manager's remarks had been jocular (R. 45; J.A. 14-15). Despite Whaley's refusal, petitioner's president and attorney solicited his signature on such a statement the following day and Whaley again refused (R. 45; J.A. 15).

Thereafter, on September 18, petitioner filed a motion for remand for the purpose of adducing additional evidence with respect to Whaley's testimony (R. 40). The Board granted petitioner's motion and scheduled the case for rehearing on January 28, 1955 (*ibid.*). On January 27, petitioner's attorney again approached Whaley with respect to his prior testimony, asking him if he still "had [his] mind made up to go through with it" or if he "would consider changing [his] statement" (R. 45; J.A. 15). Whaley refused to cooperate and testified, under subpena, at the rehearing consistently with his original testimony (R. 45-46; J.A. 15). The Trial Examiner issued a supplemental

report, affirming his original findings as to Whaley's testimony, on February 9, 1955 (R. 40).[3]

Shortly thereafter, petitioner's officials conferred concerning Whaley's performance as a foreman, admittedly discussed his testimony at the Board hearing, and decided to discharge him on the next payday (J.A. 63, 57-58). While at work on February 18, 1955, Whaley, who had been in petitioner's employ since 1939, was handed a letter stating: "As your employment in our organization here is presently unsatisfactory to management, it is hereby terminated as of today" (R. 44, 46; J.A. 16, 93-94). He was given no further explanation as to the reasons for his termination, insofar as the record shows.

Upon the foregoing facts and the entire record, the Board found that petitioner discharged Whaley because of his adverse testimony in the earlier Board proceeding and not because of his alleged deficiencies as a supervisor, as petitioner contended (R. 87-88, 48-57). Upon the premise that the statutory rights of employees necessarily include the right to seek their vindication before the Board, the Board concluded that Whaley's discharge interfered with, restrained, and coerced non-supervisory employees, in violation of Section 8(a)(1) of the Act, by causing them to fear the same reprisal if they should testify against petitioner in a Board proceeding and by unduly restricting their right to establish their case through the testi-

[3] On September 17, 1955, the Board, after considering petitioner's exceptions filed in the prior case, remanded it to the Regional Director for a new hearing. On November 4, 1955, the parties entered into a settlement agreement which was approved by the Regional Director (R. 40).

mony of supervisors who have knowledge of the facts (R. 87-89, 46-47, 63-64).[4]

In order to "restore to these employees their full freedom to exercise these rights and thus to effectuate the policies of the Act" (R. 89), the Board ordered petitioner to cease and desist from inducing or attempting to induce any witness to change his testimony in any proceeding before the Board, from discharging or otherwise discriminating against any witness for giving testimony under the Act, and from in any other manner infringing upon its employees' exercise of their statutory rights. Affirmatively, the Board ordered petitioner to reinstate Whaley with back pay and to post an appropriate notice (R. 90-94).[5]

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[4] The Board found it unnecessary to determine whether the discharge was also violative of Section 8(a)(4) of the Act, as the Trial Examiner found (R. 89, 57-63). The Board found no record support for, and hence did not adopt, the Trial Examiner's finding that Whaley's discharge was attributable in part to his union sympathies (R. 87, n. 1).

[5] A week or two before his discharge, Whaley fell and injured his back while at work (R. 53). Although no management official contradicted Whaley's testimony that he was working when discharged and able to perform the duties required of him (R. 53; J.A. 32), petitioner sought to impeach his credibility through the pleadings in a workman's compensation suit filed on Whaley's behalf by an attorney in June 1955, several months after the discharge. The petition in that case, which was unverified, alleged alternatively total or partial disability as a result of the fall (R. 53; J.A. 30, 97-107). Whaley testified that he had not read the petition, was unfamiliar with its contents, and had merely authorized his attorney to file a claim asserting where and how he was injured (R. 53; J.A. 26, 30). The trial examiner, who "gave very close attention to the demeanor" of Whaley as a witness, found that his credibility was unimpaired by the allegations of the petition filed on his behalf (R. 53-54). In accordance with its customary policy, the Board ordered back pay abated for the period, if any, that Whaley was physically incapacitated from performing his usual duties (R. 90).

Following the Board's decision and order, petitioner, on July 23, 1956, filed a petition for reconsideration and, in the alternative, a motion for remand for the purpose of adducing evidence as to whether Whaley is now physically able to perform the duties which would be required of him if he were reinstated (R. 96-139). On August 10, 1956, the Board issued an order denying the petition for reconsideration on the ground that it advanced nothing not previously considered by the Board and denying the alternative motion for remand on the ground that it related to a question of compliance and was therefore premature (R. 140).

B. *The decision of the court below.* The court below sustained the findings and order of the Board (Pet. App. 51-53). The court found substantial evidence on the record as a whole to support the Board's finding that petitioner discharged Whaley because he gave testimony adverse to its interests in the prior Board proceeding. The court further held that the Board was warranted in concluding that petitioner's conduct interfered with, restrained and coerced nonsupervisory employees in violation of Section 8(a)(1), and that a contrary conclusion was not required by Section 8(a)(4). In addition, the court concluded that the Board did not abuse its discretion in denying petitioner's motion for a remand to adduce additional evidence, and likewise denied petitioner's similar motion addressed to the court.

ARGUMENT

1. Petitioner's main argument (Pet. 7-21) that the reason for Whaley's discharge was his alleged shortcomings as a supervisor rather than his testimony before the Board raises only an issue of fact which

the court below resolved adversely to petitioner for "reasons sufficiently appearing in the Board's decision" (Pet. App. 2, R. 87-88, n. 1, 2, 48-57). This challenge to the substantiality of the evidence supporting the Board's finding presents no question warranting review by the Court. *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503.

Also inappropriate for further review is petitioner's contention (Pet. 30-36) that the Board's finding that Whaley's discharge constituted interference with, and restraint of, employees in the exercise of their rights under the Act within the meaning of Section 8(a)(1) is lacking in evidentiary support because "no rank and file employee was told or had any reason to believe" that Whaley's dismissal was prompted by his testimony at a Board hearing and that therefore "no employee could reasonably attribute the discharge of Whaley to his prior adverse testimony, or fear the same treatment, or foresee or reasonably infer the same consequences" (*id.* 34). In the absence of such evidence, the argument runs, there is no basis here for a finding of an independent unfair labor practice within the meaning of Section 8(a)(1); the unfair labor practice, if any, must be bottomed upon Section 8(a)(4) which makes it unlawful for an employer "to discriminate against an employee because he has filed charges or given testimony under this Act."[6] In essence, the argument challenges the adequacy of the evidentiary support for the Board's finding that "the net effect of Whaley's discharge was to cause non-

[6] Presumably, petitioner would then urge that since the statutory definition of the term employee excludes supervisors, Section 8(a)(4) would not reach the dismissal of Whaley who was a supervisor.

supervisory employees to fear that the [petitioner] would take the same action against them if they testified against [petitioner] in a Board proceeding to enforce their guaranteed rights under the Act," and that thereby petitioner, in violation of Section 8(a)(1), interfered with, and restrained employees in the exercise of their rights under the Act. The Board's finding in this respect comports with established principles and is adequately supported by the record. The "test of interference, restraint, and coercion under [Section 8(a)(1)] of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. * * * The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7).

The circumstances of this case made it reasonable for the Board to infer that Whaley's discharge was likely to come to the attention of employees and have a coercive effect upon them. Since Whaley testified in a public proceeding involving rank and file employees and several such employees were present as witnesses at the rehearing, at least some rank and file employees knew that he had testified adversely to petitioner. When he was discharged not long after his testimony at the rehearing, with no stated reason for the termination of his 17 years' employment other than that it was "presently unsatisfactory to management" (*supra*, p. 5), the employees would naturally attribute the discharge to the testimony and "have every good reason to fear the same treatment" if they should testify against petitioner in a Board proceeding. *National Labor Relations Board* v. *Vail*

Mfg. Co., 158 F. 2d 664, 666-667 (C.A. 7), certiorari denied, 331 U.S. 835. Since that was "obviously a natural and foreseeable consequence" of petitioner's conduct, it "follows that it was eminently reasonable for the Board to infer" restraint of rank and file employees. *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 52, 48-52; See *National Labor Relations Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 213, n. 3, 217-218 (C.A. 5); *National Labor Relations Board* v. *Injection Molding Co.*, 211 F. 2d 59, 65 (C.A. 8); *National Labor Relations Board* v. *Syracuse Color Press, Inc.*, 209 F. 2d 596, 599 (C.A. 2), certiorari denied, 347 U.S. 966.

Furthermore, even assuming that the employees were unaware of the reason for Whaley's discharge and hence felt no restraint, petitioner's conduct was nevertheless violative of Section 8(a)(1) insofar as it interfered with the employees' utilization of the Act's processes. It is necessary, if employees are to exercise freely the rights guaranteed them in Section 7, that they have unhampered use of Board procedures. The integrity of such procedures would be in serious jeopardy if witnesses who have knowledge of the facts may be intimidated by the risk of discharge into changing or withholding testimony adverse to their employer. Such infringement upon the employees' rights would be no more excused by their ignorance of the constraint than an employer's surreptitious surveillance of union activities is excused by the fact that the employees are unaware of such surveillance. See *National Labor Relations Board* v. *Clark Bros. Co.*, 163 F. 2d 373, 375 (C.A. 2); *National Labor Relations Board* v. *Collins & Aikman Corp.*,

146 F. 2d 454, 455 (C.A. 4); *National Labor Relations Board* v. *Baldwin Locomotive Works*, 128 F. 2d 39, 50 (C.A. 3); *Bethlehem Steel Co.* v. *National Labor Relations Board*, 120 F. 2d 641, 646-647 (C.A.D.C.).

There is no basis for petitioner's claim of conflict (Pet. 34-36) between the decision below and *Pedersen* v. *National Labor Relations Board*, 234 F. 2d 417 (C.A. 2). The *Pedersen* case dealt with the question whether the Board could properly dismiss a complaint which alleged that the employer had unlawfully discharged a supervisory employee for testifying, under subpena, in a prior Board proceeding, because of an intervening change in the Board's administrative jurisdictional standards. The court simply held that the protection accorded by the Act to witnesses in Board proceedings is coextensive with the power to subpena and "the Board has no discretion to diminish that protection by declining to exercise jurisdiction because of its own shifting jurisdictional standards." 234 F. 2d at 420.

2. Petitioner's further contention (Pet. 21-30) that the court below erred in refusing to remand the case to the Board for additional evidence overlooks the fact that petitioner failed to "show to the satisfaction of the court that * * * there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board" as required by Section 10(e) of the Act. The proffered evidence consisted of a deposition by Whaley in a workman's compensation proceeding which assertedly discredited his testimony in the Board hearing that he was able to perform the duties of his job when he was discharged. The deposition was taken on September 16, 1955, over seven weeks prior to the hearing in this case

(R. 128, J.A. 2). Moreover, petitioner was fully aware of the pendency of that proceeding at the time of the hearing, since it introduced into the record the summons and petition in the workman's compensation suit (*supra*, p. 6, n. 5). In this setting the denial of petitioner's belated application, "addressed to the sound judicial discretion of the court" (*Southport Petroleum Co.* v. *National Labor Relations Board*, 315 U.S. 100, 104), was not unreasonable.

3. Petitioner's claim (Pet. 36-37) that the court below should have modified the Board's order to make Whaley's reinstatement contingent upon a showing that he is now able to perform the duties which would be required of him upon reinstatement misconceives the nature of the order. The question of Whaley's present physical fitness is prematurely raised at this time, since the court's decree simply fixes petitioner's liability to remedy the unfair labor practice but leaves the details of reinstatement to be worked out in subsequent compliance proceedings before the Board. Petitioner will have full opportunity at that stage to offer further proof before the Board that Whaley's physical condition renders the reinstatement provisions impossible of compliance and to have the Board's determination judicially reviewed. *Home Beneficial Life Insurance Company, Inc.* v. *National Labor Relations Board*, 172 F. 2d 62, 63 (C.A. 4); *National Labor Relations Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209, 217-218 (C.A. 5).

4. Finally, also lacking in substance is petitioner's attack (Pet. 37-38) upon the decree of the court below insofar as it enjoins petitioner from inducing or attempting to induce any witness to change his testi-

mony in any proceeding before the Board. The record here indicates that on four occasions petitioner pressed Whaley to recant and change his testimony given in a prior Board hearing to conform to petitioner's version of the incident concerning which Whaley had testified (*supra*, p. 4). In these circumstances, the decree is necessary to protect Board witnesses against undue pressure and restraint and is therefore "adapted to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 348).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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